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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

CBS INC.,

*Petitioner,*

vs.

MARTIN W. BERDA and LINDA BERDA,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether courts should be creating new substantive rights which conflict with the legislative framework for the ordering of relations between employees and employers under the Labor Management Relations Act, so as to permit a bargaining-unit employee to proceed with state-law contract and fraud claims predicated on pre-employment individual promises that conflict with the terms of a collective bargaining agreement — a question on which the Circuits have split?

2. Whether a rule allowing state-law claims to proceed on these facts will invite bargaining-unit members to abandon the arbitral forum, which forum best serves the mandate for the development and application of uniform federal law to labor/management disputes?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW | i |
| TABLE OF AUTHORITIES | v |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THIS PETITION | 9 |
| I<br>THERE IS A SHARP SPLIT IN THE CIRCUITS OVER WHETHER THE PRE-EMPTIVE REACH OF § 301 EXTENDS TO PRE-EMPLOYMENT PROMISES ABOUT THE TERMS AND CONDITIONS OF EMPLOYMENT IN A BARGAINING-UNIT POSITION | 10 |
| A. Introduction | 10 |
| B. The Third Circuit Correctly Recognized That This Case Raises A "Circuit-Splitting" Issue | 12 |
| II<br>A RULE ALLOWING STATE-LAW CLAIMS TO PROCEED ON THESE FACTS WILL INVITE BARGAINING-UNIT MEMBERS TO ABANDON THE ARBITRAL FORUM, WHICH FORUM BEST SERVES THE MANDATE FOR THE DEVELOPMENT AND APPLICATION OF FEDERAL LAW | 18 |
| CONCLUSION | 24 |

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) | 7, 8, 12, 17, 18, 19 |
| *Anderson v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986), *cert. denied*, 483 U.S. 1011 (1987) | 13, 14, 16, 17 |
| *Avco Corp. v. Aero Lodge No. 735, International Association of Machine and Aerospace Workers*, 390 U.S. 557, *reh'g denied*, 391 U.S. 929 (1968) | 7 |
| *Bale v. General Telephone Co.*, 795 F.2d 775 (9th Cir. 1986) | 13, 17 |
| *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983) | 15, 16, 17 |
| *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987) | *passim* |
| *Darden v. United States Steel Corp.*, 830 F.2d 1116 (11th Cir. 1987) | 16 |
| *DeLapp v. Continental Can Co.*, 868 F.2d 1073 (9th Cir. 1989) | 21 |
| *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983) | 6 |
| *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359 (5th Cir.), *cert. denied*, 469 U.S. 1018 (1984) | 13, 15, 16, 17 |
| *Electrical Workers v. Hechler*, 481 U.S. 851 (1987) | 7 |

| | Page |
|---|---|
| *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944) ..... | 5, 12, 15, 18, 22 |
| *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988) ..... | 12 |
| *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) ..... | 9 |
| *Miller v. Fairchild Industries, Inc.*, 668 F. Supp. 461 (D. Md. 1987) ..... | 21 |
| *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, *reh'g denied*, 389 U.S 892 (1967) .... | 12 |
| *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965) ..... | 6, 19 |
| *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) ..... | 9 |
| *Scaife Co. v. Rockwell-Standard Corp.*, 446 Pa. 280, 285 A.2d 451 (1971), *cert. denied*, 407 U.S. 920 (1972) ..... | 18 |
| *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95 (1962) ..... | 11, 18, 21, 22 |
| *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957) ..... | 11, 19 |
| *Ulrich v. Goodyear Tire & Rubber Co.*, __F.2d__, 132 L.R.R.M. 2321 (6th Cir. September 8, 1989) ..... | 20 |
| *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960) ..... | 19 |

| | Page |
|---|---|
| *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960) | 19 |
| *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) | 19, 20 |
| *Vacca v. Viacom Broadcasting of Missouri, Inc.*, 875 F.2d 1337 (8th Cir. 1989) | 21 |
| *Varnum v. Nu-Car Carriers, Inc.*, 804 F.2d 638 (11th Cir. 1986), *cert. denied*, 481 U.S. 1049 (1987) | 13, 16, 17, 20 |
| *Wells v. General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989) | 20 |
| *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993 (9th Cir. 1987) | 6, 12, 13, 14 |
| **Statutes** | |
| Labor Management Relations Act, Section 203(d) (29 U.S.C. § 173(d)) | 2, 19 |
| Labor Management Relations Act, Section 301 (29 U.S.C. § 185(a)) | *passim* |
| National Labor Relations Act, Section 9(a) (29 U.S.C. § 159(a)) | 9 |
| National Labor Relations Act, Section 10(b) (29 U.S.C. § 160(b)) | 5, 6 |
| 28 U.S.C. § 1254(1) | 2 |
| **Other** | |
| 18A *Business Organizations*, Kheel, Labor Law (MB) § 9.05[6] (August 1989) | 14 |

Page

*State Labor Law Developments*, 4 The Lab. Law. 349 (1988) ..... 14

Yonover, *Preemption of State Tort Remedies for Wrongful Discharge in the Aftermath of Lingle v. Norge: Wholly Independent or Inextricably Intertwined?*, 34 S.D.L. Rev. 63 (1989) ..... 14

United States Supreme Court Rule 17.1(a) ..... 17

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*Petitioner,*

VS.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 881 F.2d 20 (3d Cir. 1989) and 131 L.R.R.M. 3073 (3d Cir. 1989), and is reproduced at Appendix pp. A-1-20. The opinion of the United States District Court for the Western District of Pennsylvania is unreported, and is reproduced at Appendix pp. A-22-25.

## JURISDICTION

The Judgment of the United States District Court for the Third Circuit was entered on July 20, 1989. (A-21) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 173(d):

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

29 U.S.C § 185(a):

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

## STATEMENT OF THE CASE

This petition seeks review of a decision that represents an assault on the legislative framework for the ordering of relations between employers and employees under the Labor Management Relations Act ("LMRA"). Petitioner CBS Inc. ("CBS")[1] asks

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[1] CBS has no corporate parent or affiliates, and has no corporate subsidiaries other than wholly-owned subsidiaries. All parties to the proceeding below are named in the caption.

this Court to review a Judgment of the United States Court of Appeals for the Third Circuit which allows respondents Martin W. Berda, and his wife, Linda Berda,[2] to proceed with state-law contract and fraud claims arising from a company-wide lay-off, notwithstanding the fact that Berda concedes that his lay-off was in accordance with the terms of a collective bargaining agreement (the "Collective Bargaining Agreement") between CBS and the International Brotherhood of Electrical Workers ("IBEW").

To avoid the strictures of the Collective Bargaining Agreement, Berda argued below that his lay-off violated pre-employment individual promises of job security by CBS. By these individual promises, despite the conflicting terms of of the Collective Bargaining Agreement, and unlike all other CBS bargaining-unit members, Berda argues that he alone was completely insulated from any decision by CBS to reduce its workforce, or effect any other type of lay-off contemplated by the Collective Bargaining Agreement. By the Judgment involved here, the court below concluded that the terms and conditions of Berda's employment were controlled by the alleged individual promises, and held that the pre-emptive reach of § 301 of the LMRA does not extend to the pre-employment individual promises alleged by Berda.

A. *Facts*

Prior to his hire by CBS, Berda was employed by television station WPXI in Pittsburgh, Pennsylvania in a bargaining-unit position, and served as shop steward for the local union. (A-3)

On April 14, 1986, petitioner CBS hired respondent Berda as a technician with CBS Operations and Engineering in Washington, D.C. (A-3-4) It is undisputed that this was a bargaining-unit position governed by the Collective Bargaining Agreement between CBS and the IBEW. (A-4)

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[2] As respondent Linda Berda's only claim against CBS, for loss of consortium, is purely derivative, references herein to "Berda" will refer to respondent Martin W. Berda. Respondent Linda Berda's claim is not separately addressed.

Section 1.01 of the Collective Bargaining Agreement provides that "[a]ny changes, supplements or amendments" to the Agreement must be signed by the parties. (A-27)

Section 5.03 of the Collective Bargaining Agreement provides, in pertinent part, that:

> [l]ayoffs caused by a reduction of staff shall be made in the inverse order of seniority within each of the separate units as defined in Section 5.02 . . . [which governs the seniority of all bargaining-unit employees].

(A-31)[3]

On August 29, 1986, Berda was laid off by CBS as part of a company-wide reduction in the work-force. (A-4) Berda does not dispute that his lay-off was in accordance with the terms of the Collective Bargaining Agreement.

To avoid the effect of the Collective Bargaining Agreement, Berda contends that his lay-off violated pre-employment individual promises of job security by CBS. On or about February 27, 1986, CBS allegedly induced him to accept employment by promises that he would not face any lay-offs and that he would be employed "for the reasonably foreseeable future. . . ." (A-3) In Berda's view, these promises completely insulated him from any decision by CBS to reduce its work-force, or effect any other type of lay-off contemplated by the Collective Bargaining Agreement.

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[3] Section 1.02 recognizes the Union as the sole and exclusive bargaining agent for all technicians and provides that the Collective Bargaining Agreement controls the terms and conditions of employment of technicians. (A-27)

Sections 2.01-.05 implement mandatory grievance and arbitration procedures for the "equitable and efficient settlement of disputes and controversies on specific questions arising under this Agreement . . . ." (A-28-29)

B. *Procedural history*

On January 19, 1988, respondents filed this action against petitioner CBS in the Court of Common Pleas of Allegheny County, raising state-law claims under Pennsylania law for breach of contract/promissory estoppel, fraudulent misrepresentation and loss of consortium. (A-2, 4-5)

On February 25, 1988, CBS timely removed this case to the United States District Court for the Western District of Pennsylvania on the basis of federal question and diversity jurisdiction. (A-4-5)[4]

On February 25, 1988, CBS filed an Answer, denying liability and raising, *inter alia*, the defense of pre-emption under federal law. On March 17, 1988, CBS filed a motion for judgment on the pleadings or, alternatively, for summary judgment. (A-5) On April 5, 1988, respondents filed their opposition papers.[5]

By Memorandum Opinion and Order dated June 15, 1988, the District Court concluded that respondents' claims were preempted by Section 301 of the LMRA, 29 U.S.C. § 185(a), as resolution of those claims would "ultimately depend upon the interpretation of a provision in the collective bargaining agreement . . . ." (A-25) In the District Court's view, as the individual promises were "inconsistent with Section 5.03 . . . and would limit or condition its terms," they were, therefore, subsumed into the Collective Bargaining Agreement and could be stated only as a § 301 claim. (A-25)[6] Accordingly, as this claim had not been filed within the six-month limitations period set forth in Section 10(b) of the National Labor Relations Act ("NLRA"), 29

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[4] CBS is a New York corporation with its principal place of business in New York. Respondents are citizens of the Commonwealth of Pennsylvania.

[5] In light of the procedural posture of this case, the allegations of the Complaint are not in dispute.

[6] In reaching this conclusion, the District Court relied upon *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944). (A-24)

U.S.C. § 160(b), which controls Section 301 claims,[7] the District Court granted CBS' motion and dismissed the Complaint. (A-25)

By Judgment dated July 20, 1989, the Third Circuit reversed, concluding that Berda's claims were not pre-empted by § 301, as they arose from individual promises that were made before he joined the bargaining-unit and, accordingly, could be resolved "without asking the court to analyze the collective bargaining agreement. . . ." (A-3) As the Third Circuit acknowledged, this case raises

> the circuit-splitting question whether state contract and tort claims for monetary relief brought by a bargaining unit employee against his employer based upon alleged misrepresentations of job security, made before the employee became a member of the bargaining unit, thereby conferring additional rights to those afforded by the collective bargaining agreement, are preempted by section 301 . . . .

(A-2)

In direct conflict with the Ninth Circuit's holding in *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993 (9th Cir. 1987), the Third Circuit reasoned that this Court's decision in *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987) (hereinafter "Caterpillar") controls this issue, even though that case is factually and legally distinguishable. (A-13) *Caterpillar* involved issues of removal jurisdiction and promises of job security to managerial employees relating to the terms and conditions of their employment as managerial employees. *Caterpillar*, as the Ninth Circuit

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[7] Respondents conceded in the Third Circuit that if their state-law claims are pre-empted by Section 301, the District Court properly dismissed these claims as time-barred by the six-month limitations period for Section 301 actions. *See DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 169-72 (1983). It also follows that the respondents' claims would be barred because of their failure to exhaust the grievance and arbitration procedures mandated by Sections 2.01-.05 of the Collective Bargaining Agreement. *See Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-57 (1965).

has concluded, simply does not involve individual promises about a bargaining-unit position.

In *Caterpillar*, several managerial employees were allegedly promised that they could look forward to "indefinite and lasting employment" with the corporation. *Id.* at 388-89. After they were later downgraded to bargaining-unit positions[5] and subsequently fired, they filed suit in state court, alleging, *inter alia*, breach of these individual promises of job security. *Id.* at 389-90. *Caterpillar* removed the action to federal court on the basis of § 301, and the Ninth Circuit, reversing the district court, concluded that the claim did not "arise under" § 301, and was, therefore, not pre-empted. *Id.* at 390-91.

This Court affirmed, concluding that simply because an employer may raise as a defense to a state-law contract claim a "federal question, even a § 301 question", does not mean that the claim is pre-empted by § 301. *Id.* at 398. Applying the pre-emption test of *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) this Court noted that § 301 pre-emption results only when resolution of a claim raised "on the face of the . . . complaint" will "substantially [depend upon an] analysis of [the] collective-bargaining agreement." *Caterpillar*, 482 U.S. at 392-97 (quoting *Electrical Workers v. Hechler*, 481 U.S. 851, 859 n.3 (1987)). If "[t]he heart of the [state-law] complaint [is] a . . . clause in the collective bargaining agreement," the Court agreed, the case would be removable. *Id.* at 394 (quoting *Avco Corp. v. Aero Lodge No. 735, International Association of Machinists and Aerospace Workers*, 390 U.S. 557, 558, *reh'g denied*, 391 U.S. 929 (1968)).

On the facts before it, this Court concluded in *Caterpillar* that the action was improperly removed, as the claims were premised on individual employment contracts "independent" of the bargaining agreement. *Caterpillar*, 482 U.S. at 395-97. Accordingly, this Court implicitly upheld plaintiffs' right to raise

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[5] They were allegedly assured at the time that these downgrades were temporary. *Id.* at 389.

state-law claims for breach of these individual promises, concluding that those claims were not "substantially dependent" upon interpretation of the collective-bargaining agreement, as "[plaintiffs] rely on contractual agreements *made while they were in managerial or weekly salaried positions – agreements in which the collective-bargaining agreement played no part.*" *Id.* at 395 & n.9 (emphasis added).

Relying upon *Caterpillar*, the Third Circuit reasoned that "not all pre-employment contracts are subsumed by [a subsequent] collective bargaining agreement," and concluded that § 301 does not preempt state-law contract claims premised on pre-employment individual agreements that confer rights beyond those afforded by a collective bargaining agreement, even though inconsistent with its terms. (A-14-15) Applying the *Lueck* test, the Court of Appeals, therefore, concluded that resolution of Berda's state-law contract claim is not "substantially dependent" upon an analysis of his Collective Bargaining Agreement, as his claim is premised on contract rights which are "independent" of the Collective Bargaining Agreement, and which survive its terms. The court similarly concluded that Berda's tort claim was not pre-empted, as he "was not required to refer to the collective bargaining agreement in order to state his tort claim", but "need only plead and establish that [CBS] promised him that he would not be laid off for a reasonable period of time [knowing] . . . that . . . CBS was planning a reduction in force that would affect him" and show reliance on that promise. (A-17) In its view, the fact

> that the misrepresentations concerned layoffs and that there was a provision of the collective bargaining agreement that also related to layoffs *are facts of no consequence*, because Berda need not refer to the provision . . . in order to make out his claim."

(A-18) (emphasis added).

For these reasons, the Third Circuit reversed the dismissal of the Complaint and allowed respondents' claims to proceed.[9]

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[9] The Third Circuit did not reach CBS' other arguments that Berda's state-law claims were precluded because they arguably presented unfair labor practices

*(Footnote continued)*

On August 3, 1989, the Third Circuit stayed the issuance of its mandate, pending the filing of this petition.

*REASONS FOR GRANTING THIS PETITION*

This petition presents the Court with an opportunity to clarify the pre-emptive ambit of § 301 and thereby resolve the conflict in the Circuits over whether state-law claims arising from pre-employment promises about a bargaining-unit position are pre-empted by § 301.

Berda's thesis is that (1) the alleged pre-existing individual contract, made at a time when he was a shop steward at station WPXI and about a prospective bargaining-unit position at CBS, survived the Collective Bargaining Agreement and became a co-existing contract during the relevant time period — throughout his bargaining-unit employment and when the allegedly wrongful discharge occurred; and (2) that this individual contract controlled the terms and conditions of his bargaining-unit employment on matters of conflict. Accordingly, by these alleged promises, despite the conflicting terms of an admittedly applicable Collective Bargaining Agreement, and unlike all other CBS bargaining-unit members, Berda claims a position of privilege which would be prohibited by the Collective Bargaining Agreement, and which allegedly completely insulated him from any decision by CBS to reduce its work-force, or effect any other type of layoff contemplated by the Collective Bargaining Agreement. By allowing Berda to pursue these claims, the Third Circuit allows highly questionable state-law theories to invade federally regulated conduct.

This decision, reflecting, as it does, the tension between individual rights and remedies under state-law and obligations

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within the exclusive jurisdiction of the National Labor Relations Board (*see San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)), or because the individual contract conflicted with the principle of exclusive representation in § 9(a) of the National Labor Relations Act. *See Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 146 (1976). CBS raised both of these arguments before the District Court, and urged them again on appeal, but the Third Circuit declined to address them. (A-19-20)

under collective bargaining agreements, the breach of which might constitute a violation of federal labor law, simply strays too far from this Court's, and, indeed, Congress', efforts to establish a uniform federal labor law in matters relating to the interpretation of collective bargaining agreements.

The Third Circuit decision also sharpens the conflict in the Circuits over the pre-emptive ambit of § 301 and actually invites bargaining unit members to abandon the arbitral forum, which forum best serves the mandate for the application of uniform federal labor law. As a result, state courts may now entertain a host of lawsuits brought by bargaining unit members seeking to circumvent the strictures of their collective bargaining agreements. More ominously, if the Third Circuit rule prevails, employers may refuse to agree to grievance/arbitration provisions in collective bargaining agreements, so as to create a level playing field, knowing that an employee can easily circumvent any such provision by alleging the existence of an "independent" pre-employment agreement.

For these reasons, this Court should grant this petition, resolve the conflict in the Circuits, and end this potential assault on the collective bargaining process.

## I.

## THERE IS A SHARP SPLIT IN THE CIRCUITS OVER WHETHER THE PRE-EMPTIVE REACH OF § 301 EXTENDS TO PRE-EMPLOYMENT PROMISES ABOUT THE TERMS AND CONDITIONS OF EMPLOYMENT IN A BARGAINING-UNIT POSITION

### A. *Introduction*

Section 301 of the LMRA, 29 U.S.C. § 185(a), confers federal jurisdiction over

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . .

This statute is both a jurisdictional grant and a mandate for the development and application of federal substantive law. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957). Section 301 represents a Congressional mandate for the courts to fashion a uniform body of federal common law for the resolution of disputes arising under collective bargaining agreements, "according to the precepts of federal labor policy." *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962).[10] This body of federal common law is "uniformly to prevail over inconsistent local rules." *Id.* at 104.

This Court has recognized that the "ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace." *Id.* State-law which frustrates the effort of Congress to stimulate the smooth functioning of that process "strikes at [its] very core . . . ." *Id.*

For these reasons, when state-law is invoked to regulate activities which are the subject of a collective bargaining agreement, national labor policy requires that state law yield. Section 301, therefore, pre-empts state-law claims directly based on rights created by a collective bargaining agreement, as well as claims that are "substantially dependent on analysis of a collective-bargaining agreement." *Caterpillar*, 482 U.S. at 394. The judicially-created test for § 301 pre-emption provides that:

> when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, *that claim must either be treated as a* § 301 claim

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[10] This Court analyzed the pre-emptive effect of § 301 in *Lucas Flour*, which involved an issue of contract interpretation: whether a collective bargaining agreement implicitly prohibited a strike called by the union. The Washington Supreme Court resolved this issue by applying state-law rules of construction. This Court rejected that approach, and concluded that the claim must be brought under § 301 and resolved by reference to federal law, in order to ensure uniform interpretation of collective bargaining agreements and, thus, to promote the consistent resolution of labor/management disputes. *Lucas Flour*, 369 U.S. at 102-106.

*. . . or dismissed as pre-empted by federal labor-contract law.*

*Lueck*, 471 U.S. at 220 (emphasis added); *see also Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988) (state law claim pre-empted if it "requires the interpretation of a collective bargaining agreement").[11]

As seen below, there is a sharp split in the Circuits over whether the pre-emptive reach of § 301 extends to pre-employment promises that conflict with the terms of a collective bargaining agreement.

B. *The Third Circuit Correctly Recognized That This Case Raises A "Circuit-Splitting" Issue*

The Third Circuit correctly recognized that the Circuits have split on the issue of whether the pre-emptive reach of § 301 extends to state-law claims arising from pre-employment promises. Four other Circuits have now faced, and divided on, the issue of whether pre-employment promises concerning the terms and conditions of employment in a bargaining-unit position implicate § 301. *Compare Young v. Anthony's Fish Grottos, Inc.*,

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[11] A logical corollary to the broad pre-emptive reach of § 301 is the rule precluding bargaining-unit members from negotiating individual contracts that are inconsistent with the terms of a collective bargaining agreement. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944); *see also NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180, *reh'g denied*, 389 U.S. 892 (1967) (national labor policy "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.")

For this reason, individual contracts, "no matter what the circumstances that justify their execution or what their terms, *may not be . . . used to . . . limit or condition the terms of the collective agreement . . .* [or] . . . subtract from collective ones. . . ." *J.I. Case*, 321 U.S. at 337-39 (emphasis added).

Although *J.I. Case*, admittedly, did not involve § 301 pre-emption principles, as discussed below, the District Court here, and the Fifth Circuit, have applied the *J.I. Case* principles to § 301 claims.

830 F.2d 993 (9th Cir. 1987) (post-*Caterpillar*) and *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359 (5th Cir.) (pre-*Caterpillar*), *cert. denied*, 469 U.S. 1018 (1984) *with Varnum v. Nu-Car Carriers, Inc.*, 804 F.2d 638, 640 (11th Cir. 1986) (pre-*Caterpillar*), *cert. denied*, 481 U.S. 1049 (1987) and *Anderson v. Ford Motor Co.*, 803 F.2d 953, 955-59 (8th Cir. 1986) (pre-*Caterpillar*), *cert. denied*, 483 U.S. 1011 (1987).

Under the Ninth Circuit view, for example, the court will focus on the nature of the job involved. If the pre-employment promise involves the terms and conditions of employment in a *bargaining-unit position*, any state-law claims arising from those promises will be pre-empted by § 301. In *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993 (9th Cir. 1987), plaintiff was allegedly promised at the time of hire that she could be discharged only for just cause. *Id.* at 996. Her position, however, was governed by a collective bargaining agreement, which provided that during an employee's 30-day probationary period, the employee could be discharged at will. Plaintiff was fired after one day on the job, and brought suit asserting state-law claims for, *inter alia*, breach of this individual promise and misrepresentation. *Id.*

The Ninth Circuit, reaffirming its holding in *Bale v. General Telephone Co.*, 795 F.2d 775, 779-80 (9th Cir. 1986)[12] rejected Young's argument that her "individual" contract was

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[12] In *Bale*, decided pre-*Caterpillar*, plaintiffs contended that they were told at the time of hire that after six months they would no longer be considered "temporary" employees as defined by the collective bargaining agreement, but rather would be accorded regular employee status. Subsequently, however, when several regular employees returned from leaves of absence, plaintiffs were discharged. *Bale*, 795 F.2d at 777.

The Ninth Circuit held that plaintiffs' state-law tort claims were not "sufficiently removed from the collective bargaining agreement to fall outside the preemptive ambit of section 301," reasoning that adjudication of plaintiffs' tort claims "would require reference to, and interpretation of, the terms of the collective bargaining agreement." *Id.* at 779-80.

independent of the collective bargaining agreement,[13] reasoning as follows:

> The subject matter of her contract, however, is a job position covered by the [collective bargaining agreement]. Because any "independent agreement of employment [concerning that job position] could be effective only as part of the collective bargaining agreement," the [collective bargaining agreement] controls and the contract claim is preempted.[14]

*Young*, 830 F.2d at 997-98.

In so holding, the Ninth Circuit distinguished this Court's decision in *Caterpillar*, concluding that that decision merely holds that "a breach of contract claim *concerning a job not governed by a collective agreement* could be effective independent of the agreement and is therefore not completely pre-empted." *Id.* (emphasis added)[15]

Prior to *Caterpillar*, the Fifth Circuit similarly held that § 301 pre-empts pre-employment individual promises about a

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[13] The Ninth Circuit explicitly rejected the contrary holding of the Eighth Circuit in *Anderson v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986), discussed *infra* at pp. 16-17. *Young*, 830 F.2d at 997 n. 1.

[14] The *Young* court also concluded that the tort claims were pre-empted as well, as they were inextricably intertwined with the terms of the Collective Bargaining Agreement. *Id.* at 999-1002.

[15] This view is shared by the commentators, who have uniformly concluded that *Caterpillar* does not apply to pre-employment individual promises about a bargaining-unit position. *See, e.g.*, Yonover, *Preemption of State Tort Remedies for Wrongfull Discharge in the Aftermath of Lingle v. Norge: Wholly Independent or Inextricably Intertwined?*, 34 S.D.L. Rev. 63, 88 n. 22 (1989)(noting split in Circuits on issue of § 301 pre-emption of state-law claims based on "fraudulent misrepresentation allegedly made before there was a collective bargaining agreement" and observing that *Caterpillar* "did not directly resolve this split") (citing *State Labor Law Developments*, 4 The Lab. Law. 349, 355-56 (1988) (Committee Reports Issue)); *see also* 18A *Business Organizations*, Kheel, Labor Law (MB) § 9.05[6](August 1989).

bargaining-unit position. In *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359, 360 (5th Cir. 1984), a former employee brought suit for breach of an alleged pre-employment individual promise that he would "receive full compensation [for work-related injuries] during any period of total or partial disability, or until retirement." After a period of disability, plaintiff was discharged because of his inability to work, in accordance with the provisions of his collective bargaining agreement, and subsequently sued on this individual promise.

The Fifth Circuit determined that the alleged "independent" contract was tantamount to a contract for lifetime employment. Applying federal substantive law, the Fifth Circuit concluded that Eitmann's claim was subsumed into and pre-empted by the collective bargaining agreement, as it attempted to "limit or condition" the terms and conditions of his employment set forth in the collective bargaining agreement, including the discharge provisions. *Id.* at 362-63, relying upon *J.I. Case*.

In reaching this conclusion, the Fifth Circuit deemed inapposite this Court's holding in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), where this Court recognized the right of strike replacements, who were discharged when strikers returned, to bring a state-law breach of contract action based on promises of permanent employment. *Belknap* was not persuasive, the Fifth Circuit reasoned, because the *Belknap* plaintiffs were not covered by a collective bargaining agreement and "sought relief that [§ 301] did not afford them." *Eitmann*, 730 F.2d at 364. The claims were, therefore, "of only peripheral concern" to federal labor law. *Belknap*, 463 U.S. at 498. For these reasons, the Fifth Circuit held Eitmann's claims pre-empted, noting that "[t]o hold otherwise . . . would frustrate the policy of the federal labor laws." *Eitmann*, 730 F.2d at 364.

Other Circuits to face the issue have reached the opposite conclusion, focusing solely on the timing of the alleged representations. In their view, if representations are made to an individual before he joins a bargaining-unit, § 301 will not be implicated at all, even if those representations concern the terms and

conditions of his employment in a bargaining-unit position. For example, in *Varnum v. Nu-Car Carriers, Inc.*, 804 F.2d 638 (11th Cir. 1986), plaintiff was allegedly induced to accept employment by misrepresentations that work was allocated on a "first-in-first-out" basis, which would provide equal work opportunities to truckers, regardless of seniority. Shortly after plaintiff's employment began, his employer implemented a seniority-based dispatch system, in accordance with a collective bargaining agreement. *Id.* at 639.

The Eleventh Circuit allowed the state-law fraud claim to proceed, reasoning that the claim "did not go to a term of employment covered by the collective bargaining agreement." As "the complaint focused on conduct that occurred prior to the plaintiff's accepting employment, the case is . . . not pre-empted by Section 301." *Id.* at 640.[16] In so holding, the Eleventh Circuit deemed *Belknap* persuasive, despite the differences in the plaintiff's statuses, *i.e.*, Varnum became a bargaining-unit member subject to the terms of a collective bargaining agreement.

To the same effect is the rule in the Eighth Circuit. In *Anderson v. Ford Motor Co.*, 803 F.2d 953, 954-55 (8th Cir. 1986), plaintiffs had been laid off, then re-hired, only to be "bumped" from jobs by employees on a preferential hiring list, in accordance with a collective bargaining agreement. Plaintiffs were considered "new hires" because their "recall rights" under the collective bargaining agreement had expired.

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[16] The court distinguished the contrary holding of *Eitmann*, which is discussed above at page 15, mistakenly concluding that *Eitmann* did not involve pre-employment promises. *Varnum*, 804 F.2d at 640.

A different panel of the Eleventh Circuit, however, has held that state-law claims premised on representations of job security to one already an "employee" under a collective bargaining agreement will be pre-empted, distinguishing *Caterpillar* on this basis. *Darden v. United States Steel Corp.*, 830 F.2d 1116, 1118-20 (11th Cir. 1987) (state-law claims pre-empted where premised on "independent" promises of job security to employee on "layoff status," who was later allegedly induced to take job by representations that employer had enough work to guarantee him employment for ten years).

A divided panel of the Eighth Circuit, observing that the claims before it "closely resemble those considered in *Belknap*", concluded that the state-law contract claims were not pre-empted, as they were premised on promises that were made "before . . . they were even covered by the collective bargaining agreement." *Id.* at 958.[17] The court similarly concluded that resolution of the fraud claim would not substantially depend upon any analysis of the agreement: "proof of fraud does not depend on the existence of any contractual relationship, nor do the standards for judging fraudulent misconduct derive from any contractually-established expectations of the parties." *Id.* at 957.

Accordingly, there is a sharp split in the Circuits over whether pre-employment individual promises about a bargaining-unit position implicate § 301. The Ninth and Third Circuits now also diverge on whether this Court's decision in *Caterpillar* controls this issue. The confusion in the Circuits over the proper scope of this Court's § 301 pre-emption teachings is also underscored by the fact that this Court's earlier decision in *Belknap*, deemed inapposite by the Fifth Circuit in *Eitmann*, was deemed controlling by the Eleventh Circuit in *Varnum* and the Eighth Circuit in *Anderson*, even though those courts were all faced with cases involving pre-employment promises about the terms and conditions of employment in a bargaining-unit position.

For these reasons, this Court should grant this petition and guide the Circuits on the proper pre-emptive reach of § 301. *See* Supreme Court Rule 17.1(a). As seen below, the rule adopted by the Third Circuit also threatens to undermine the integrity of the collective bargaining process.[18]

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[17] The court cited, but rejected, the contrary holding of the Ninth Circuit in *Bale*, discussed above at note 12. *Anderson*, 803 F.2d at 958. The dissent would have followed *Bale* and argued that the case should be seen as tantamount to a misrepresentation about the terms of the collective bargaining agreement, which would mean, therefore, that resolution of the state-law claims could not be divorced from an analysis of the collective bargaining agreement. *Id.* at 960 (Bright, J., dissenting).

[18] If this petition is granted, CBS will argue on the merits that the Third Circuit misread *Caterpillar* and erred in its application of the *Lueck* test. For

(*Footnote continued*)

## II.

## A RULE ALLOWING STATE-LAW CLAIMS TO PROCEED ON THESE FACTS WILL INVITE BARGAINING-UNIT MEMBERS TO ABANDON THE ARBITRAL FORUM, WHICH FORUM BEST SERVES THE MANDATE FOR THE DEVELOPMENT AND APPLICATION OF FEDERAL LAW

Paralleling the development of this Court's pre-emption principles has been the Court's recognition that the grievance-arbitration provisions of collective bargaining agreements are particularly sacrosanct. The need to "preserve the effectiveness of [private] arbitration" as a means of achieving industrial peace "was one of the central reasons that underlay the Court's holding in *Lucas Flour*." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202,

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example, before a court can reach the merits of Berda's individual contract claim, it must first determine whether § 1.01 supersedes and precludes enforcement of the alleged individual promise, a determination which would substantially depend upon an analysis of the Agreement. *See* Section 1.01 ("Any changes, supplements or amendments made during the term of this Agreement must be reduced to writing. . .[and] signed by the parties. . .".) (A-27) Secondly, the Third Circuit erred in dismissing CBS' argument that *J.I. Case* precludes enforcement of the alleged pre-employment individual promises of job security as, plainly, no claim could be more inconsistent with the terms of the Collective Bargaining Agreement, which contains specific provisions relating to lay-offs (§ 5.03) and seniority (§ 5.02). (A-30-31) Thirdly, the alleged representation by CBS is tantamount to a misrepresentation about the job security he would enjoy in a bargaining-unit position. Or, more simply, it was a misrepresentation about the terms and conditions of the Collective Bargaining Agreement, resolution of which turns on an analysis of the lay-off and discharge provisions of the Collective Bargaining Agreement. To state a claim for misrepresentation under Pennsylvania law, moreover, Berda would have to show "justifiable" reliance on these representations of job security, which were contrary to the terms of the Collective Bargaining Agreement. *See Scaife Co. v. Rockwell-Standard Corp.*, 446 Pa. 280, 284-285, 285 A.2d 451, 454 (1971), *cert. denied*, 407 U.S. 920 (1972). Resolution of this reliance issue would, therefore, involve the court in an analysis of the terms of the Collective Bargaining Agreement, as Berda, who served as a shop steward in his previous employment, would have to offer evidence of his pre-hire lack of knowledge of the terms and conditions of the Collective Bargaining Agreement, and the legal effect of those provisions.

219 (1985). Indeed, Congress has expressly approved of contract grievance procedures as a preferred method of settling labor disputes. *See* Section 203(d) of the LMRA, 29 U.S.C. 173(d) ("[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. ") A federal common law must, therefore, be developed under § 301 to ensure specific performance of arbitration clauses in collective bargaining agreements, because Congress intended § 301 to be the mechanism for labor peace and "[p]lainly, the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455 (1957).

Therefore, since the *Steelworkers* trilogy decisions in 1960[19] the Court has stressed that the express policy of the LMRA "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 566 (1960).

To permit this "full play," an order to arbitrate a dispute cannot be denied unless it is clear that the arbitration provision cannot be interpreted to cover the dispute. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). A rule that "permit[s] an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness," as well as "eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Lueck*, 471 U.S. at 220 (citation omitted); *see also Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965) (warning against creating exceptions to the requirement that bargaining-unit members be required to resort to the grievance

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[19] *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

and arbitration provisions of their contract); *Warrior & Gulf Navigation*, 363 U.S. at 578 (arbitral process is the alternative to economic warfare).

The Third Circuit rule promises to do violence to these interests, as it invites bargaining-unit members to abandon the arbitral forum, which forum best serves the mandate for the development and application of uniform federal labor law to labor-management disputes. If this rule prevails, a bargaining-unit employee who wishes to challenge his discharge, or, potentially, any other term or condition of his employment, need only plead the existence of a pre-employment individual agreement. Those allegations will be sufficient to avoid the grievance and arbitration strictures of his collective agreement, and defeat § 301 pre-emption. This will result even where, as here, the individual agreement squarely conflicts with the terms of a collective bargaining agreement. The Eleventh Circuit in *Varnum* voiced these same concerns, acknowledging that its decision allowing state-law claims to proceed might be "construed to open the floodgates to a myriad of state law actions. . . ." *Varnum*, 804 F.2d at 643 (Hoffman, J., concurring).

This action is tangible proof that the court's fear was well-founded. The Third Circuit rule will now mean that whenever an employer discusses the terms or conditions of employment with a prospective bargaining-unit employee, it risks exposing itself to a state court lawsuit arising from those representations. As a result, courts may now entertain a host of wrongful discharge lawsuits brought by bargaining-unit members seeking to avoid the arbitral forum provided by their collective bargaining agreements.[20]

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[20] The sheer number of recent cases struggling with the issue of whether § 301 pre-empts "independent" contracts shows that *Caterpillar* has not provided clear guidance on this issue. *See, e.g., Ulrich v. Goodyear Tire & Rubber Co.*, ____F.2d____, 132 L.R.R.M. 2321 (6th Cir. September 8, 1989) (state-law claims premised on individual promises of job securitiy following reorganization pre-empted by § 301); *Wells v. General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989)(§ 301 does not pre-empt state-law fraud claims arising from "separation agreement" by which employees would receive severance payment in lieu

*(Footnote continued)*

More ominously, if the Third Circuit rule prevails, employers may refuse to agree to grievance/arbitration provisions in collective bargaining agreements at all, so as to create a level playing field, knowing that an employee can easily circumvent any such provision by alleging the existence of an "independent" pre-employment agreement. cf. *Lucas Flour*, 369 U.S. at 104 (the "existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral . . . resolution of disputes.")

Secondly, the rule urged by CBS is both logical and fair on these facts. It is not unreasonable or unfair to charge a prospective bargaining-unit employee with knowledge that the terms and conditions of his employment will be dictated solely by his collective bargaining agreement. This argument is even more compelling here. Prior to his employment by CBS, Berda was a shop steward with the local union at television WPXI, and cannot, and does not, claim unfamiliarity with the nature of the collective bargaining process. Berda knew he was accepting a bargaining-unit position and should be charged with the knowledge that the terms and conditions of his employment by CBS would be reflected in the Collective Bargaining Agreement.[21]

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of preserving seniority and rehire rights); *Vacca v. Viacom Broadcasting of Missouri, Inc.*, 875 F.2d 1337 (8th Cir. 1989)(state-law claims by union member against successor employer for violation of allegedly "separate" agreement to pay law school tuition pre-empted by § 301); *DeLapp v. Continental Can Co.*, 868 F.2d 1073 (9th Cir. 1989)(state-law contract claim pre-empted by § 301 where employee argued employer orally promised not to enforce recall provision of collective bargaining agreement so as to preserve early pension benefits); *Miller v. Fairchild Industries, Inc.*, 668 F. Supp. 461 (D. Md. 1987)(§ 301 does not pre-empt state-law fraud and misrepresentation claims premised on promises of job security).

[21] Notwithstanding the arguments raised by respondents below, the rule of pre-emption urged by petitioner will not give employers a license to deceive prospective employees. The conduct alleged by respondents, as even the court below acknowledged, could constitute an unfair labor practice, which will act as a powerful deterrent to employers bent on such a course of deception.

*(Footnote continued)*

Finally, the Third Circuit rule also threatens to disrupt industrial peace. This Court has recognized that the "ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace." *Lucas Flour*, 369 U.S. at 104; *see also J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944) (the "very purpose" of the collective bargaining process is to "supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group.") State-law which frustrates the effort of Congress to stimulate the smooth functioning of that process "strikes at [its] very core." *Lucas Flour*, 369 U.S. at 104.

On the facts of *Caterpillar*, a rule against pre-emption of the individual contract involved there did no violence to these federal interests, as the individual promises there concerned managerial positions outside the scope of a collective bargaining agreement. 482 U.S at 388, 395 n. 9. Here, however, Berda premises his claims against CBS on individual promises about the terms and conditions of employment in a bargaining-unit position, promises that offer more protection than the Collective Bargaining Agreement, and, in fact, are in complete conflict with the Collective Bargaining Agreement. As this Court has cautioned, the "practice and philosphy of collective bargaining looks with suspicion on such individual advantages," because of their potential to disrupt industrial peace. *J.I. Case Co.*, 321 U.S. at 338. That is because individual gain is "often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole." *Id.* at 338-39. *See also Caterpillar*, 482 U.S. at 396.

The practical effect of such a rule is not difficult to envision. For example, if CBS had not discharged Berda because of the alleged individual promises, to meet its reduction in force goals

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(A-19-20) *See also Caterpillar*, 482 U.S. at 397 (noting that its holding did not preclude the parties from questioning the "legality or viability" of the individual contracts as an unfair labor practice.)

CBS would, potentially, have been forced to lay-off another bargaining-unit member with more seniority, who otherwise would not have been subject to lay-off under § 5.03 of the Collective Bargaining Agreement. At the very least, that bargaining-unit member would then presumably grieve his lay-off under the Collective Bargaining Agreement, with an uncertain result. The rule adopted by the court below will, therefore, inevitably undermine the integrity of the collective bargaining process.

## CONCLUSION

Pre-emption of state-law claims under § 301 serves to protect the federal labor law scheme from erosion by courts intent on vindicating state-law rights. The decision of the Third Circuit, if left undisturbed, heralds a significant departure from this goal and invites future litigants to seek ways to skirt the arbitral forum, which lies at the heart of the collective bargaining process. Accordingly, petitioner CBS Inc. respectfully requests that this Court grant this petition in order to review the decision below and thereby provide guidance to the Circuits on the proper pre-emptive reach of § 301.

Dated: October 16, 1989

Respectfully submitted,

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# APPENDIX

## APPENDIX INDEX


| | Page |
|---|---|
| Third Circuit Opinion, July 20, 1989 ..... | A-1 |
| Third Circuit Notice of Judgment, July 20, 1989 . | A-21 |
| District Court Memorandum Opinion, June 15, 1988 ..... | A-22 |
| District Court Order, June 15, 1988 ..... | A-26 |
| Excerpts from Collective Bargaining Agreement between CBS Inc. and International Brotherhood of Electrical Workers..... | A-27 |

Filed: July 20, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 88-3405

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MARTIN W. BERDA, and
LINDA BERDA, his wife,

*Appellants*

v.

CBS INC., a corporation,

*Appellees*

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On Appeal From the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 88-0411)

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Argued: November 1, 1988

Before: GIBBONS, *Chief Judge*,
BECKER and WEIS,
*Circuit Judges*

(Filed July 20, 1989)

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## OPINION OF THE COURT

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BECKER, *Circuit Judge.*

This case involves the circuit-splitting question whether state contract and tort claims for monetary relief brought by a bargaining unit employee against his employer based upon alleged misrepresentations of job security, made before the employee became a member of the bargaining unit, thereby conferring additional rights to those afforded by the collective bargaining agreement, are preempted by section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a) (1982).

Appellant Martin Berda ("Berda") brought this suit against his former employer, appellee CBS Inc. ("CBS"), asserting two contract claims (breach of an individual employment contract and promissory estoppel) and two tort claims (fraud and negligent misrepresentation). Appellant Linda Berda, Berda's wife, asserts a derivative claim for loss of consortium. All of the claims are founded upon Pennsylvania law, and the Berdas seek only monetary relief. CBS

contends that since Berda's employment with CBS was governed by the terms and conditions of a collective bargaining agreement between CBS and the International Brotherhood of Electrical Workers ("IBEW") -- a contention not disputed by Berda -- the state law claims are preempted by the LMRA.

The district court concluded that resolution of Berda's claims was dependent upon the collective bargaining agreement, that the alleged oral contract was inconsistent with the collective agreement, and that the claims were therefore preempted by section 301. Consequently, the court granted CBS's motion for judgment on the pleadings or, in the alternative, for summary judgment inasmuch as the complaint was not filed within the six-month statute of limitations applicable to actions arising under section 301. Because we believe that Berda can establish the allegations in his well-pleaded complaint without asking the court to analyze the collective bargaining agreement, we will reverse and remand to the district court for further proceedings.

I.

The facts relevant to this appeal are essentially uncontested. On February 27, 1986, while employed as a technician by station WPXI in Pittsburgh, Berda met with Emil Franks and M. Lynwood Heighes, Jr., employees of CBS, to discuss his possible future employment with CBS in Washington, D.C. According to the complaint, Berda was told at this meeting, among other things, that he would be guaranteed employment with CBS for the reasonably foreseeable future, and that any job offered to him would not be seasonal or temporary but would be a permanent position. CBS subsequently offered Berda employment in Washington, D.C., and, in April 1986, allegedly relying upon CBS's promises, Berda and his wife

moved to Washington so that he could assume his duties as a CBS technician there.

Shortly after commencing work at CBS, Berda joined the IBEW. The parties agree that Berda's employment at CBS was covered by the terms and conditions of a collective bargaining agreement between CBS and the IBEW. Section 5.03 of that agreement pertains to layoffs, and provides in pertinent part that:

> [l]ayoffs caused by a reduction of staff shall be made in the inverse order of seniority within each of the separate units as defined in Section 5.02 within the jurisdiction of each local union. . . .

Section 5.02 of the collective bargaining agreement contains the provisions relating to seniority of all employees covered by the agreement.

On August 29, 1986, less than five months after he began working for CBS, and in accordance with the terms of the collective bargaining agreement, Berda was laid off as part of a company-wide reduction in force. Berda alleges that CBS had decided prior to the February 27 meeting with him to conduct extensive layoffs in the department and division of CBS in which he was eventually offered employment, and hence that Frank and Heighes knew or should have known that their promises and representations to him were false.

On January 19, 1988, Berda filed a complaint in the Court of Common Pleas of Allegheny County, alleging breach of contract (or, alternatively, promissory estoppel) and tortious misrepresentation. The complaint did not refer to the collective bargaining agreement. CBS removed the case to the district court for the Western District of Pennsylvania alleging both federal question jurisdiction, on the ground that the suit was preempted by section 301 of

the LMRA, and thus, if it stated any cause of action, it stated one under section 301, *see Avco Corp. v. Machinists*, 390 U.S. 557, 558 (1968),[1] and diversity jurisdiction.[2] CBS then moved for judgment on the pleadings or summary judgment.

The district court held that any resolution of the state law claims was substantially dependent upon an analysis of section 5.03 of the collective bargaining agreement between CBS and the IBEW and that Berda's alleged individual contract was "inconsistent with section 5.03 ... and would limit or condition its terms." Dist. Ct. Op. at 5 (June 21, 1988). It therefore held that the claims were preempted by section 301 of the LMRA. Finding that the Berdas could not

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1. Ordinarily, a complaint cannot be removed to federal court, pursuant to the court's federal question jurisdiction, unless the complaint on its face states a federal claim. However, the Supreme Court has found that in certain instances the preemptive force of federal law is so "powerful as to displace entirely any state cause of action." *Franchise Tax Bd. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 23 (1983). In such instances, federal law is said to "completely preempt" state law, and removal is permitted because, although pled as a state claim, the claim is actually considered to arise under the federal law that displaces the state law. *Id.* at 24.

Section 301 of the LMRA is one such instance of complete preemption; it displaces entirely "any state cause of action 'for violation of contracts between an employer and a labor organization.'" *Id.* at 23 (citing *Avco*, 390 U.S. at 560). Thus, in *Avco* and subsequent cases, courts have allowed the defendant to remove state contract lawsuits when the suits were preempted by section 301 of the LMRA, even though the plaintiffs had not pled LMRA claims, because such complaints are considered to state a claim, if any, under section 301 of the LMRA. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

2. Because the case was properly removed on the basis of diversity jurisdiction, even though, as discussed below, we find that the suit was not preempted by section 301, the case will remain in federal court.

maintain the suit as an LMRA action because it was not filed within the LMRA's six-month statute of limitations, *see DelCostello v. Teamsters*, 462 U.S. 151, 169-72 (1983) (applying six-month statute of limitation in a section 301 cause of action), the district court dismissed the action. The Berdas appeal. The issue before us is whether the district court was correct in concluding that Berda could bring suit, if at all, only pursuant to section 301.[3]

II.

A.

Section 301(a) of the Labor Management Relations Act provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). On its face, this statute provides for federal jurisdiction over controversies involving collective bargaining agreements. However, the Supreme Court has concluded that section 301 also expresses a congressional intent that the federal courts develop a federal common law to be applied in suits for enforcement of collective bargaining

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3. Our standard of review in an appeal from a grant of summary judgment is plenary. *See Joseph v. Hess Oil*, 867 F.2d 179, 181 (3d Cir. 1989). We must view the facts in the light most favorable to the party against whom judgment is sought and draw all reasonable inferences in favor of the non-moving party. In order to affirm, we must conclude that there are no genuine issues of material fact, and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

agreements. *See Textile Workers v. Lincoln Mills*, 353 U.S. 448, 451 (1957).

When a suit stating a claim under section 301 is brought, state contract law is displaced, and the collective agreement is interpreted under this federal common law. *See Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962). The purpose of preempting state contract law with a uniform federal law is to allow parties to collective bargaining agreements to have some certainty as to the way that the agreement will be construed by courts. As the Supreme Court explained:

> [T]he subject matter of § 301(a) "is peculiarly one that calls for uniform law." ... The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might some day be invoked in enforcing the contract.

*Id.* at 103 (citation omitted). Lack of certainty as to the meaning of contract terms could lead to lack of agreement; thus, if state laws were not preempted, industrial peace would be threatened. *Id.* at 104.

The Supreme Court has also held that section 301 preemption extends beyond contract claims and reaches certain claims sounding in tort. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985). In *Lueck*, the Court noted that if section 301

were held not to preempt state tort law, it "would elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract." *Id.* at 211. Thus, the Court adopted the following rule: "when resolution of a state-law claim is *substantially dependent upon analysis* of the terms of an agreement made between the parties in a labor contract, the claim must either be treated as a § 301 claim . . . or dismissed as pre-empted by federal labor-contract law." *Id.* at 220 (citation omitted) (emphasis added). *See also International Brotherhood of Electrical Workers v. Hechler*, 107 S. Ct. 2161 (1987) (claim that union breached duty of care to ensure safety of workplace preempted by § 301 because substantially dependent on whether under the collective bargaining agreement the union had assumed this duty).

However, the Supreme Court has made it clear that "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301." *Lueck*, 471 U.S. at 211. In *Lingle v. Norge Div. of Magic Chef, Inc.*, 108 S. Ct. 1877 (1988), the Court held that section 301 did not preempt a state law tort claim for retaliatory discharge, even though the collective bargaining agreement governing the employment provided for arbitral adjudication of an employee's claim that she was fired without just cause. The Court reasoned that in order to prevail on her retaliatory discharge claim she need not ask a court to interpret the collective bargaining agreement. It found that

> even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require

> addressing precisely the same set of facts, as long as the state law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 preemption purposes.

*Id.* at 1883.

Finally, and, most importantly, in *Caterpillar, Inc. v. Williams*, 107 S. Ct. 2425 (1987), the Court held that section 301 did not preempt a state *contract* law suit in which plaintiffs, who were union members, alleged that their employer breached individual oral employment agreements that promised them "'indefinite and lasting employment,'" and pre-dated their joining the union. 107 S. Ct. at 2427 (citation omitted). The plaintiffs in *Caterpillar* had been non-union employees of the company at the time the initial alleged promises were made. They were later downgraded to bargaining unit positions, but alleged that they were promised at the time that the downgrades were temporary. *Id.* at 2428. Plaintiffs were subsequently laid off from their bargaining unit positions, and brought suit in state court alleging that their employer had breached the oral agreements in violation of state contract law. The Supreme Court, applying the *Lueck* test, upheld the plaintiffs' right to bring a state contract claim, finding that their "complaint is not substantially dependent upon interpretation of the collective-bargaining agreement. It does not rely upon the collective agreement indirectly, nor does it address the relationship between the individual contracts and the collective agreement." *Id.* at 2431.

Furthermore, the Court in *Caterpillar* held that the fact that as part of a defense of a state law contract claim an employer might raise "a federal question, even a § 301 question" does not mean that the claim

is preempted by section 301. *Id.* at 2433. The preemption of state law engendered by section 301 is only occasioned when the claim raised "on the face of the complaint" substantially depends on interpretation of a collective bargaining agreement for its resolution. *Id.*

In *Caterpillar*, the Court also revisited its decision in *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). *J.I. Case* dealt with the issue of when an employer could have separate individual agreements with unionized employees and when such agreements are subsumed by the collective bargaining agreement such that they can have no independent legal effect. It held that employers and employees could not maintain individual agreements that give an employee less than the employee would be given under the collective bargaining agreement. *Id.* 321 U.S. at 336. To this end, the Court stated that,

> [i]ndividual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement.

*Id.* at 337.

However *J.I. Case* did not adopt a blanket rule prohibiting individual contracts with bargaining unit members. The Court stated that employers and employees may enter individual contracts that "embody matters not necessarily included within the statutory scope of collective bargaining," to the extent that such contracts are "not inconsistent with a

collective agreement or do[] not amount to or result from or [are] not part of an unfair labor practice." *Id.* at 339. And, most important for the instant case, *J.I. Case* specifically did not hold that individual contracts *more* advantageous to the employee than the collective agreement are subsumed by the collective agreement. Although acknowledging that such individual contracts can be "disruptive of industrial peace," *id.* at 338, the Court declared that,

> individual contracts cannot subtract from collective ones, and whether under some circumstances they may add to them in matters covered by the collective bargain, we leave to be determined by appropriate forums under the law of contracts applicable, and to the Labor Board if they constitute unfair labor practices.

*Id.* at 339.

Relying on this language from *J.I. Case*, the *Caterpillar* Court rejected the employer's claim that the collective bargaining agreement subsumed the employees' earlier oral contracts for long-term employment which gave them more rights than the collective agreement did. It stated that "individual employment contracts are not inevitably superseded by any subsequent collective agreement covering an individual employee, and claims based upon them may arise under state law." 107 S. Ct. at 2431. And it explained that the employer's basic error was "its failure to recognize that [an employee] covered by a collective-bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied upon is *not* a collective bargaining agreement." *Id.* at 2431-32.

B.

It is undisputed that Berda's employment with CBS was governed by the terms and conditions of the collective bargaining agreement between CBS and the IBEW. However, Berda contends that his contract, promissory estoppel, and tort claims can be resolved independently of the collective bargaining agreement. He asserts that a court, in addressing these claims, need examine only the circumstances surrounding the alleged misrepresentations made to him by CBS before he was hired and the fact that he was laid off.

CBS rejoins that Berda's claims are based on an alleged individual contract which is inconsistent with the terms of the collective bargaining agreement, and that the claims substantially depend on interpretation of the collective agreement. It therefore contends that the claims are preempted by the collective bargaining agreement and that the action must be brought, if at all, under section 301 of the LMRA.

Several of our sister circuits have been faced with similar questions. The Court of Appeals for the Eleventh Circuit has allowed similar state fraudulent misrepresentation claims to go forward, *see Varnum v. Nu-Car Carriers, Inc.*, 804 F.2d 638, 640 (11th Cir. 1986),[4] and a divided panel of the Court of Appeals for the Eighth Circuit has allowed both state fraud and contract claims to proceed based on alleged pre-employment misrepresentations by an employer. *See Anderson v. Ford Motor Co.*, 803 F.2d 953, 955-59 (8th Cir. 1986).

In contrast, prior to the Supreme Court's decision in *Caterpillar*, the Court of Appeals for the Ninth

4. However, the Eleventh Circuit has not allowed state law misrepresentation actions when the alleged misrepresentation took place while the employee was already covered by a collective bargaining agreement. *See Darden v. United States Steel Corp.*, 830 F.2d 1116, 1119-20 (11th Cir. 1987).

Circuit held that state fraudulent misrepresentation claims arising from alleged pre-employment misrepresentations are preempted by section 301. *See Bale v. General Telephone Co.*, 795 F.2d 775, 779-80 (9th Cir. 1986). And, after *Caterpillar*, it has maintained this position. *See Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 997 n.1 (9th Cir. 1987).

All these courts have agreed that the claims are only preempted to the extent that they "substantially depend" on the interpretation of a collective bargaining agreement. However, the courts have differed on the more particular question whether in fact there would be substantial dependence in the case before them. *See Anderson*, 803 F.2d at 958-59 (distinguishing *Bale*). On similar facts they reach different answers.

We believe that *Caterpillar* controls the result in the instant case. As noted above, *Caterpillar* makes clear that in order for there to be section 301 preemption, the plaintiff, in its well-pleaded complaint, must plead an action that requires interpretation of the collective bargaining agreement.[5] *See* supra Typescript at 9-10. Consequently, we must turn to the particular claims raised in Berda's complaint and see if they "substantially depend" on analysis of the collective bargaining agreement. As will be seen, we conclude that Berda's claims are not preempted.

1. The Contract and Promissory Estoppel Count

In his contract and promissory estoppel count, Berda alleges that CBS's pre-employment

5. The complaint must be "well-pleaded;" thus a plaintiff cannot escape preemption merely by failing to plead essential elements of its case.

representation that he would not be laid off constituted a term governing his employment with CBS on which he relied and that CBS breached that term by laying him off. CBS, however, provides us with no argument of substance as to why this count of Berda's complaint requires interpretation of the collective bargaining agreement.

CBS first contends that the contractual claims are preempted because they relate to "the basic terms and conditions of Mr. Berda's employment." Appellee's Br. at 8. However, Berda's contract claims are very similar to the plaintiffs' claims in *Caterpillar*. In *Caterpillar*, the Supreme Court held that claims of pre-existing employment contracts for long-term employment were not preempted by section 301. *See* supra Typescript at 9.

CBS next contends that Berda's oral agreement is inconsistent with sections 5.02 and 5.03 (the seniority and layoff provisions) of the collective agreement, as well as the provision of the collective bargaining agreement that makes the IBEW the exclusive bargaining agent of the employees, and the provision that requires that supplements and amendments to the collective bargaining agreement must be made in writing and be agreed to by CBS and the IBEW. CBS contends, therefore, that Berda's claims are "necessarily subsumed into the collective bargaining agreement," and thus that Berda's action "arises, if at all, under Section 301 of the LMRA." Appellee's Br. at 10.

However, as noted above, *Caterpillar* made it clear that not all pre-employment contracts are subsumed by the collective bargaining agreement. *See* supra Typescript at 10-12. Indeed, as in *Caterpillar*, the oral agreement at issue in the instant case gave an advantage to the employee, and thus, as in *Caterpillar*, we cannot say that the oral agreement

was subsumed by the collective agreement such that no state cause of action can be premised on the oral contract. We note, as the Supreme Court noted in both *J.I. Case* and *Caterpillar*, that whether an employee can get relief under an individual agreement that gives him an advantage beyond the rights he has under the collective bargaining agreement should "'be determined by appropriate forums under the law of contracts applicable, and by the Labor Board if they constitute unfair labor practices.'" *Caterpillar*, 107 S. Ct. at 2431 (quoting *J.I. Case*, 321 U.S. at 339).

We are not currently presented with the question whether the existence of a subsequent collective bargaining agreement may constitute a defense to Berda's contract claim under state or federal law.[6] Nor are we presented with the question whether the oral agreement is void because it constitutes an unfair labor practice. We are only concerned in this appeal with section 301 preemption, and the Supreme Court has made clear that section 301 does not preempt state contract causes of action premised on pre-employment agreements that are advantageous to the employee. *See Caterpillar*, 107 S. Ct. at 2431 (plaintiff can assert state contract rights "so long as the contract relied upon is *not* a collective-bargaining agreement"). Because the contract count of Berda's complaint is not substantially dependent on interpretation of the collective bargaining agreement under *Caterpillar*, his contract claims are not preempted under section 301 of the LMRA, and thus we must reverse so that he may pursue them on remand, in the district court.[7]

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6. As noted above, the Supreme Court has held that the possibility that a federal claim may be raised in the defense of a contract suit does not mean that the state contract claim is preempted under section 301. *See* supra Typescript at 10.

7. CBS urges that language from this Court's opinion in *Malia v. RCA Corp.*, 794 F.2d 909 (3d Cir 1986), requires that we find

2. The Tort Claims

Berda also asserts claims for fraud and negligent misrepresentation. As noted above, the Supreme Court, in *Lueck*, stated that "[i]f the policies that animate § 301 are to be given their proper range . . . the preemptive effect of § 301 must extend beyond suits alleging contract violation." *Lueck*, 471 U.S. at 210. However, the Court then set forth the rule that a state-law tort claim is preempted by § 301 only if its resolution is "substantially dependent upon analysis of the terms of a collective bargaining agreement." *Id.* at 220.[8]

---

Berda's prior contract to be subsumed into the collective agreement. *Malia* held that an employee who had formerly been in a bargaining unit, but was promoted out of the bargaining unit, could maintain state law contract and tort claims based on representations made at the time he was promoted that he could be reinstated in the bargaining unit position if he so desired.

In *Malia*, we said that the LMRA does not "prevent an individual -- whether an applicant for new employment or a current employee in a supervisory position – from negotiating for a job in a bargaining unit so long as that employment will be on the terms and conditions set forth in the collective bargaining agreement." 794 F.2d at 913. CBS suggests that this language precludes an employee from maintaining a state law suit based on a pre-employment agreement that is separate from the collective bargaining agreement. We believe the language to be ambiguous. However, to the extent that that language suggests that an employee can never sue on a pre-employment agreement giving him more rights than the collective bargaining agreement, we believe that it does not survive *Caterpillar*. As noted above, in *Caterpillar* the Supreme Court allowed employees to sue on an independent contract that gave them additional rights, despite their subsequent union membership. *See supra* Typescript at 16.

8. At another point in the *Lueck* opinion, the Court stated that state tort claims would be preempted only if "inextricably intertwined with consideration of the terms of the labor contract". 471 U.S. at 213. Taking this phrase in the context of the whole opinion, we believe that the Court intended this as a statement equivalent to "substantial dependence."

To maintain a misrepresentation claim under Pennsylvania law, the plaintiff must establish:

> 1) a false representation of an existing fact ...; 2) if the misrepresentation is innocently made, then it is actionable only if it relates to a matter material to the transaction involved; while if the misrepresentation is knowingly made or involves a non-privileged failure to disclose, materiality is not a requisite to the action ...; 3) scienter, which may be either actual knowledge of the truth of falsity of the representation, reckless ignorance of the falsity of the matter, or mere false information where a duty to know is imposed on a person by reason of special circumstances, ... 4) reliance which must be justifiable, so that common prudence or diligence could not have ascertained the truth; and, 5) damage to the person relying thereon.

*Shane v. Hoffman*, 227 Pa. Super. 176, ___, 324 A.2d 532, 536 (1974).

When we consider these elements, it becomes clear that Berda was not required to refer to the collective bargaining agreement in order to state his tort claim. Instead, as Berda contends, in order to maintain a suit for misrepresentation, he need only plead and establish that Franks and Heighes promised him that he would not be laid off for a reasonable period of time although they knew (or were reckless in not knowing) that in fact CBS was planning a reduction in force that would affect him, that he reasonably relied on this misrepresentation, and that his reliance damaged him.

CBS contends that resolution of this tort claim does depend on interpretation of a collective bargaining agreement because "[t]here is no escaping the fact that the alleged misrepresentations relate to

the specific terms of Mr. Berda's employment by CBS in a bargaining unit position controlled by a collective bargaining agreement which speaks to those very terms." Appellee's br. at 16. However, that the misrepresentations concerned layoffs and that there was a provision of the collective bargaining agreement that also related to layoffs are facts of no consequence, because Berda need not refer to the provision in the collective bargaining agreement in order to make out his claim. Despite CBS's intimations, Berda need not establish that the oral promise made to him prior to his employment differed from the terms of the collective bargaining agreement in order to get relief. *See Lingle*, 108 S. Ct. at 1882-83 (holding that plaintiff may pursue state tort claim that does not involve construing collective bargaining agreement, even if collective bargaining agreement also provides remedy for wrong).

Finally, CBS contends that allowing Berda to proceed with his state law claims would be disruptive of industrial peace. The Supreme Court observed in *J.I. Case* that contracts which give an advantage to individual employees can be disruptive. Demonstrably, regardless of whether the employer is acting maliciously or innocently, the very existence of individual contracts that give certain employees better terms than the union has obtained for them can undermine the employees' support for the union and lead to industrial discord.

However, section 301 preemption is not the only, or even the primary, tool available for promoting industrial peace. As discussed above, section 301 preemption has the limited purpose of ensuring that a uniform law is applied in interpreting collective bargaining agreements. To the extent that conduct (including a company practice of entering into contracts that give advantages to individual

employees) constitutes an unfair labor practice that is damaging to the union, the union can file a grievance with the National Labor Relations Board. *See Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944) (it is an unfair labor practice to by-pass union and bargain directly with individual employees as to "wages hours and working conditions").

Furthermore, we note, as the Supreme Court noted in *Caterpillar*, that section 301 is not the only type of preemption applicable in labor cases.

> The employer may argue [in the state law suit] that the individual employment contract has been pre-empted due to the principle of exclusive representation in § 9(a) of the National Labor Relations Act (NLRA), 29 U.S.C. § 1599(a).... Or the employer may contend that enforcement of the individual employment contract arguably would constitute an unfair labor practice under the NLRA, and is therefore pre-empted....

107 S. Ct. at 2432. But these doctrines are distinct from section 301 preemption. Only section 301 preemption converts the state law claim to a section 301 claim so that the statute of limitations for section 301 applies. For the foregoing reasons, we hold that neither Berda's contracts claims nor his tort claims are preempted by section 301 of the LMRA, and thus we conclude that the statute of limitations for section 301 actions does not apply. Therefore, the district court erred and we must reverse. We hold that Berda may proceed in the district court on his state contract and tort claims.

III.

CBS raises two other legal contentions on this appeal. First, it contends that the district court should have dismissed the case as preempted by the

National Labor Relations Act, under the doctrine of preemption articulated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Second, it contends that Berda's tort count actually alleges a wrongful discharge claim and that Pennsylvania law does not allow an employee who was a member of a union to bring such a claim.

These contentions were not passed upon by the district court. Generally, in the absence of "exceptional circumstances," we decline to "consider an issue not passed upon below." *Selected Risks Insurance Co. v. Bruno*, 718 F.2d 67, 69 (3d Cir. 1983). We find no exceptional circumstances here. Hence these questions must be addressed by the district court in the first instance.

In light of the foregoing, the judgment of the district court will be reversed, and the case will be remanded for further proceedings.

A True Copy:

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*Clerk of the United States Court of Appeals*
*for the Third Circuit*

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

July 20, 1989

TO: Joseph J. Hinchliffe, Esq. *
Arthur J. Schwab, Esq.
Helen M. Gold, Esq.

NOTICE OF JUDGMENT

This Court's opinion was filed and Judgment was entered today in case No. 88-3405 and copies are enclosed herewith.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| MARTIN W. BERDA and LINDA BERDA, his wife, | ) | |
| Plaintiffs | ) | |
| v. | ) | Civil Action No. 88-411 |
| CBS INC., a corporation, | ) | |
| Defendant | ) | |

MEMORANDUM OPINION

Presently before the Court is a motion by defendant CBS Inc. for judgment on the pleadings or, in the alternative, for summary judgment.

Defendant's motion will be granted and plaintiffs' complaint will be dismissed for reasons set forth below.

I.

Plaintiffs made the following allegations in their complaint.

Plaintiff Martin Berda previously had been employed by television station WPXI in Pittsburgh, Pennsylvania.

Mr. Berda met with Mr. Emil Franks and Mr. M. Lynwood Heighes, agents of CBS, on February 27, 1986. At that meeting, Franks and Heighes made a number of representations to Mr. Berda which were designed to induce Mr. Berda to leave his job at WPXI and to come to work for CBS in Washington, D.C. They represented, among other things, that Mr. Berda would have employment with CBS for the reasonably foreseeable future without fear of lay-off; and that any job offered to Mr. Berda would be a permanent position and would not be seasonal or temporary.

CBS subsequently offered Mr. Berda employment in Washington, D.C. Mr. Berda then resigned his position with WPXI and began working for CBS on April 14, 1986. A collective bargaining agreement between CBS and the International Brotherhood of Electrical Workers was in effect at the time that Mr. Berda began working for CBS.

Mr. Berda was laid off by CBS on August 29, 1986, less than five months after he began working for CBS, as part of a company-wide reduction in work force. Plaintiffs allege that CBS already had decided prior to the meeting of February 27, 1986 to conduct extensive lay-offs in the department and division of CBS in which Mr. Berda eventually was offered employment.

All of plaintiffs' claims are based on state-law rights of action. Count I is for fraud and negligent misrepresentation. Count II is for breach of contract and promissory estoppel. Count III is for loss of consortium.

II.

The issue presently before the Court is whether plaintiffs' claims, which are formulated as state-law claims, in fact arise under a collective bargaining agreement and therefore must be resolved under federal law pursuant to 29 U.S.C. § 185(a).

29 U.S.C. § 185(a) provides a federal right of action for violations of contracts between an employer and a labor organization representing employees. It specifically provides that:

> Suits for violation of contracts between an employer and a labor organization, representing employees in an industry affecting commerce...may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

This statutory provision evidences a Congressional intention that *federal* common law, as opposed to state common law, should

be applied to cases involving a collective bargaining agreement. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1987).

Although Congress did not indicate the extent to which it intended 29 U.S.C. § 185(a) to preempt state law, the Supreme Court recently stated that:

> questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.

*Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985). A state-law claim should either be treated as a claim arising under 29 U.S.C. § 185(a) or dismissed as preempted by federal labor-contract law when its resolution "is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Lueck*, 471 U.S. at 220. The focus of inquiry in determining such preemption must be on the nature of the state-law claims because state-law claims that are independent of a collective bargaining agreement are not preempted. *See Malia v. RCA Corp.*, 794 F.2d 909, 912 (3d Cir. 1986), *cert. denied*, 107 S.Ct. 3210 (1987).

In addition, while individual contracts between an employer and an employee are not altogether precluded by the existence of a collective bargaining agreement, the collective bargaining agreement must prevail to the extent that the individual contract is inconsistent with it. *See J.I. Case Co. v. NLRB*, 321 U.S. 332, 337-39 (1944). An individual contract may not limit or condition or subtract from the terms of a collective bargaining agreement. *Id.*

III.

The oral agreement Mr. Berda alleges he entered into with CBS provides, essentially, for his continued employment with CBS, without regard to his seniority (or lack thereof), in the event that CBS should decide to reduce its work force through lay-offs.

Plaintiffs' action is governed by 29 U.S.C. § 185(a) because their claims ultimately depend upon the interpretation of a provision in the collective bargaining agreement in effect at the time between CBS and the International Brotherhood of Electrical Workers. Section 5.03 of the collective bargaining agreement pertains to lay-off. It provides in pertinent part that:

> Layoffs caused by a reduction of staff shall be made in the inverse order of seniority within each of the separate units as defined within Section 5.02 within the jurisdiction of each local union....

Plaintiffs' action also arises under 29 U.S.C. 185(a) because the alleged oral agreement which underlies their state-law claims is inconsistent with Section 5.03 of the collective bargaining agreement and would limit or condition its terms.

Mr. Berda was laid off on August 29, 1986. Plaintiffs' action was not commenced, however, until January 19, 1988, some seventeen months later. The six-month limitation period set forth at 29 U.S.C. § 160(b) governs actions arising under 29 U.S.C. § 185(a). *See Del Costello v. Teamsters*, 462 U.S. 151, 169-72 (1983). Plaintiffs' action therefore will be dismissed as time-barred.

An appropriate order will be issued.

Dated: June 15, 1988.

/s/ Hubert I. Teitelbaum

Hubert I. Teitelbaum
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| MARTIN W. BERDA and LINDA BERDA, his wife, | ) | |
| Plaintiffs | ) | |
| v. | ) | Civil Action No. 88-411 |
| CBS INC., a corporation, | ) | |
| Defendant | ) | |

ORDER

AND NOW, June 15, 1988, for reasons set forth in the foregoing Memorandum Opinion, IT IS HEREBY ORDERED that the above-captioned case is dismissed.

/s/ Hubert I. Teitelbaum
Hubert I. Teitelbaum
United States District Judge

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# EXCERPTS FROM COLLECTIVE BARGAINING AGREEMENT

## ARTICLE I

Section 1.01.

* * * * *

(c) Any changes, supplements or amendments made during the term of this Agreement must be reduced to writing, numbered serially, signed by the parties hereto, signed by each Local Union and approved by the International President of the IBEW, and then shall become a part of this Agreement.

* * * * *

**Section 1.02. Recognition and Scope.** (a) The Employer recognizes the right of Technicians covered by this Agreement to self-organization and to bargain collectively through representatives of their own choosing and, accordingly, hereby recognizes the IBEW as the sole and exclusive bargaining agent for all Technicians.

(b) This Agreement covers employment by CBS (including any Division or subsidiary) involving any of the work specified in Section 1.03 hereof when done in connection with the production and/or recording of material for broadcast, theatre, or pay television, film-tape or tape-film transfer or standard conversion or recording processes in connection with broadcasting and those types of closed-circuit upon which Technicians have been or are now performing services. In no event shall anything contained in this paragraph be construed as adversely affecting any work currently being performed by Technicians under this Agreement.

## ARTICLE II

**Section 2.01. Grievance Procedures.** In order to provide for the equitable and efficient settlement of disputes and controversies on specific questions arising under this Agreement, it is agreed that the procedures set forth in this Article II of this Agreement will govern the conduct of the parties.

**Section 2.02. Initiating Grievance Procedures.** (a) There shall be a Local Union-Management Grievance Committee, composed of not more than three (3) representatives of the Local Union and not more than three (3) representatives of the Employer. Upon written notice by either party to the other, this Committee shall meet within five (5) working days. The request for such meeting shall state the question or questions to be discussed.

(b) If agreement cannot be reached by the Committee within ten (10) working days (or within an extension of this period of time, as may be mutually agreed upon by the Committee) of its initial meeting, either of the local parties shall request approval from its respective headquarters office of said local party's issuance of a formal demand for arbitration (to the other local party) and, when such approval is granted, arbitration of the issue(s) shall proceed at the city of origin of same not later than fourteen (14) days after the receiving party has been served with the arbitration demand.

(c) Where any issue has been brought to the attention of one party by the other and the aggrieved party has not notified the other of its desire to arbitrate for a period of six (6) months subsequent to the date upon which such issue was first brought before the Committee, the issue shall be deemed finally waived and disposed of and may not be subsequently arbitrated.

**Section 2.03. Arbitrators.** An individual Arbitrator in each case shall be selected by the parties pursuant to the rules of the American Arbitration Association.

**Section 2.04. Arbitration Rules, Procedures.**

(a) After following the procedures set forth in Section 2.02 (above), either party may request arbitration by delivering a signed, written notice to the other party and to the American Arbitration Association.

(b) Arbitration shall be conducted pursuant to applicable laws and statutes and the rules and regulations of the American Arbitration Association. The Arbitrator shall have the exclusive right and obligation to determine whether or not there is an arbitrable issue; provided, however, that decisions shall be limited to the determination of grievances arising under this Agreement and any matters stated to be not arbitrable by the terms of this Agreement shall not be considered. Nothing in this Article II shall be construed as prohibiting the National parties to this Agreement from participating in any arbitration hereunder.

(c) Any decision or award of an Arbitrator shall be final and binding upon both parties, whether rendered prior to or following the expiration of the term of this Agreement, and may be enforced or reviewed in any court of competent jurisdiction, but shall not include an amendment or addition to the terms of this Agreement.

(d) A final decision or award by an Arbitrator shall be made within fourteen (14) days following the close of the hearing. No such decision or award shall be made retroactive to a time earlier than six (6) months prior to that date upon which the grievance was first initiated under Section 2.02 hereof.

(e) Decisions or awards shall remain effective until the expiration of the original term of this Agreement or until the expiration of any extension of said term.

(f) Each party will bear its own expense of arbitration and will equally share the fees and expenses of the Arbitrator(s).

**Section 2.05. Special Procedures for Discharge Grievance and Arbitration.** Notwithstanding the procedures set forth above, questions arising out of the discharge of a Technician shall be treated expeditiously in a manner agreed upon by the Local Union-Management Grievance Committee.

Section 5.02. Seniority. Within the jurisdiction of each Local Union, the seniority of all employees covered by this Agreement shall be determined as follows:

(a) The seniority of each Technician shall start as of the date that each Technician was employed by the Employer to perform work as specified in Section 1.03 hereof, except that the seniority date for those Assistant Technicians reclassified as a result of this Agreement shall be October 1, 1969.

(b) At San Francisco, all Technicians presently on the staff will be credited with seniority from the date of their initial employment with KQW or KCBS, as the case may be.

(c) At Chicago, all Technicians presently on the staff of WBBM-TV will be credited with seniority from the date of their initial employment with WBKB or WBBM-TV, as the case may be.

(d) At Washington, all Technicians presently on the staff will be credited with the seniority shown on the mutually certified seniority list.

(e) At St. Louis, all Technicians presently on the staff of KMOX shall be credited with seniority from the date of their initial employment with KMOX. All Technicians presently on the staff of KMOX-TV shall be credited with seniority from the date of their initial employment with KWK, KWK Incorporated, or KMOX-TV. It is understood that there shall be two separate seniority lists; a seniority list for KMOX and a seniority list for KMOX-TV. Those Technicians hired subsequent to September 30, 1972, shall be credited with seniority from the date of their initial employment with KMOX or KMOX-TV and shall have their names placed on the appropriate seniority list as the case may be.

(f) Seniority for staff Technicians at CND News Bureaus in cities outside the jurisdictional radii set forth in Section 1.04(2) of this Agreement shall be credited on a separate basis for each bureau beginning on the date the Technician starts employment at such bureau.

**Section 5.03. Layoffs and Re-hires.** (a) Layoffs caused by a reduction of staff shall be made in the inverse order of seniority within each of the separate units as defined in Section 5.02 within the jurisdiction of each local union. Any Technician who is laid off shall receive three (3) weeks' notice of such layoff or three (3) weeks' pay in lieu of such notice. In addition to such aforementioned notice of layoff, or pay in lieu thereof, CBS shall pay severance pay to any Technician who is laid off, according to the scale set forth in Section 5.11.